QUESTION PRESENTED

Whether the court of appeals correctly determined that the establishment clause of the First Amendment prohibits the government from endorsing religion by displaying a Nativity Scene and a Chanukah Menorah at buildings which represent the political authority of the state.

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Nos. 87-2050, 88-90 and 88-96

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COUNTY OF ALLEGHENY, CITY OF PITTSBURGH, AND CHABAD,

Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION GREATER PITTSBURGH CHAPTER, ELLEN DOYLE, MICHAEL ANTOL, REVEREND WENDY L. COLBY, HOWARD ELBLING, HILARY SPATZ LEVINE, MAX LEVINE AND MALIK TUNADOR,

Respondents.

ON WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT MALIK TUNADOR

Statement of the Case

For several years, the County of Allegheny and the City of Pittsburgh have placed sectarian religious displays on the premises of the buildings which house their government offices. Allegheny County permits only government-authorized forms of expression in the courthouse. (J.A. 100.) The courthouse Nativity Scene contains figurines representing the Virgin Mary and Joseph kneeling in front of a baby Jesus attended by three kneeling shepherds whose hands are clasped in prayer. The shepherds represent the three wise men

who travelled to witness the miraculous birth of Jesus, as recounted in Matthew 2:11-12. An angel rests on the roof of the barn, holding a banner bearing the Latin inscription "Glory in Excelsis Deo," or "Glory to God in the Highest," taken from Luke 2:1. (J.A. 101-104.)

A large Chanukah Menorah stands on the steps of Pittsburgh's City-County Building. The Chanukah Menorah is a religious symbol commemorating miracles associated with the Jewish holiday of Chanukah, which marks the redemption of the ancient temple by the Jews.

In addition to various courts, the Allegheny County Courthouse contains the Sheriff's office, the offices of the County Treasurer, County Controller, County Commissioner, and the County Clerk. The Pittsburgh City-Council Building houses the Mayor's office, the City Council, the City-Treasurer, some civil courts and other governmental offices.

Anyone entering the Allegheny County Courthouse or passing by the Pittsburgh City-County Building cannot avoid seeing these religious displays. Plaintiffs of various religious faiths described the personal affront which they experienced upon viewing these religious symbols. Malik Tunador, a Moslem of Turkish origin, testified that he felt that his government was discriminating against him. (J.A. 112). Ellen Doyle, a Roman Catholic, and Howard Elbling, a Jewish resident of Pittsburgh, explained that the religious symbols offended them in a similar manner. (J.A. 101, 125.)

This lawsuit was initiated in district court to restrain Allegheny County from maintaining the Nativity Scene at the County Courthouse and to restrain the City of Pittsburgh from erecting a Chanukah Menorah at the City-County Building. Following a hearing on December 15, 1986, the district judge denied the requested preliminary injunction. Following a second hearing, the district judge entered an order denying the plaintiffs' motion for a permanent injunction and for declaratory relief. The plaintiffs appealed, and a majority of a panel of the United States Court of Appeals for the Third Circuit reversed the district judge. The Third Circuit applied the tripartite establishment clause analysis developed by this Court in *Lemon v. Kurtzman*, 403 U.S. 603, 612-613 (1971) and

held that the religious displays violated the second prong of the *Lemon* test by creating the appearance of government endorsement of religion. *A.C.L.U. v. County of Allegheny*, 842 F.2d 655 (3rd Cir. 1988).

After this Court granted *certiorari*, Petitioner Chabad brought a motion in the court of appeals asking it to stay its decision but, following *en banc* consideration, eleven of the twelve active judges on the appellate panel denied that motion. Chabad then brought a motion in this Court seeking to stay the lower court's decision. This Court denied that motion on November 28, 1988.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the establishment clause prohibits the display of religious symbols on buildings which house government offices. These premises embody the political authority of the state, and religious symbols at these locations communicate the message that the represented faiths are endorsed or approved by the government. That message violates the establishment clause because it diminishes the political stature of those who do not adhere to the represented religions.

The court of appeals' analysis of the unconstitutional effect created by the physical setting of the religious symbols comports with this Court's consistent sensitivity to the constitutional significance of the physical environment of religious activities.

Historical examples of religion in our nation's public life do not affect the constitutional analysis in this case. The establishment clause examines only the effect of the two religious symbols at issue in this case in their particular settings; historical remarks and unrelated examples of religion in public life are constitutionally irrelevant.

Finally, Chabad's argument that the presence of a Christmas tree on the steps of the Pittsburgh City-County Building requires an accompanying display of a Chanukah Menorah is totally without merit. The First Amendment forbids government aid to any and all religions. The constitutional prohibition against governmental endorsement of one religion cannot be avoided by the government's endorsement of an additional religious faith.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE DISPLAYS OF RELIGIOUS SYMBOLS IN THE ALLEGHENY COUNTY COURTHOUSE AND THE PITTSBURGH CITY-COUNTY BUILDING VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

A. The Court of Appeals Correctly Determined That Religious Symbols On Property Devoted to The Core Functions of Government Violate The Establishment Clause.

The second prong of the tripartite establishment clause test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), prohibits government activities which have the effect of sponsoring or endorsing religion.[1] Applying the *Lemon* analysis, the court of appeals concluded that the religious displays violated the establishment clause chiefly because the displays occupied the premises of public buildings devoted to the core functions of government:

> Each display was located at or in a public building devoted to the core functions of government and each was placed at a prominent site at the public building where visitors would see it. . . . [T]he only reasonable conclusion is that by permitting the creche and the menorah to be placed at the buildings, the city and the county have tacitly endorsed Christianity and Judaism and have therefore acted to advance religion.

842 F.2d at 662.

In *American Jewish Congress v. City of Chicago*, the Seventh Circuit also recognized the impermissible message which flows from the display of religious symbols in a building which embodies the political authority of government:

> The presence of the government in Chicago's City Hall is unavoidable. The building is devoted to government functions: for example, both city and county government offices are located there, and the City Council holds its meetings there. Because City Hall is so plainly under government ownership and control, every display and activity in the building is implicitly marked with the stamp of government approval. The presence of a nativity scene in the lobby, therefore, inevitably creates a clear and strong impression that the local government tacitly endorses Christianity.

[1] To pass constitutional muster under the establishment clause, the challenged government activity must have a secular purpose, its primary effect must neither advance nor inhibit religion, and it must not foster excessive government entanglement with religion. 403 U.S. 602, 612-613.

> The message of endorsement is equally powerful on the symbolic level. Like the nativity scene itself, City Hall is a symbol—a symbol of government power. The very phrase "City Hall" is commonly used as a metaphor for government. A creche in City Hall thus brings together Church and State in a manner that unmistakably suggests their alliance. The display at issue in this case advanced religion by sending a message to the people of Chicago that the city approved of Christianity.

827 F.2d 120, 128 (7th Cir. 1987).

Other federal courts have also concluded that displays in these locations violate the establishment clause. In *Burelle v. City of Nashua*, a district judge held that the primary effect of a privately-owned creche at the entrance of the "building which houses the municipal government offices of the City of Nashua" conveys to the public the implicit message of government support for the religion represented by the creche. 599 F. Supp. 792, 793, 795 (D.N.H. 1984). Similarly, in *A.C.L.U. v. Mississippi State General Services Adm'n*, the district court held that the display of a cross on a state office building unconstitutionally endorses religion. 652 F. Supp. 380 (S.D. Miss. 1987). Most recently, in *Smith v. Lindstrom*, a district judge in Virginia also concluded that a religious display located at the seat of government violated the establishment clause. The memorandum opinion in that case is reprinted and attached hereto as an appendix. In *Smith*, the court analyzed at length the constitutional significance of the county office building in Albemarle County, and held, "[t]hus, the location of the instant creche, displayed prominently with an unseverable visual association between the trappings of County government and the religious symbols, created the unmistakable message of endorsement." App. 22a. The district judge emphasized that a religious display at the offices of government could not pass constitutional muster because it communicated a message of government endorsement of religion. *See also, A.C.L.U. v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986) (Latin cross "prominently displayed on a public building that is clearly marked as and known to be such . . . dramatically conveys a message of governmental support for Christianity").

The court of appeals' determination in the instant case that placing religious displays in buildings which house the government unconstitutionally unites church and state comports with the deci-

sions of this Court. In *Grand Rapids Sch. Dist. v. Ball*, Justice Brennan explained that the establishment clause forbids the union of the symbols of government and religion:

> [A]n important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by nonadherents as a disapproval, of their individual religious choices.

473 U.S. 374, 391 (1985).

The placement of the two religious displays in this case manifestly unites the authority of government with the widely known symbols of two major religious traditions. The establishment clause prohibits that symbolic link which arises when any religion acquires a special influence or relationship with the government. *Larkin v. Grendel's Den*, 459 U.S. 116, 125-126 (1982). *Lemon* requires an examination of all of the circumstances of challenged government activities. 403 U.S. at 614. Under the circumstances of the present case, the state endorsed two particular religions by representing them in the buildings which epitomize the authority of government. The court of appeals correctly determined that displaying religious symbols which commemorate sacred religious events in the corridors of government communicates the constitutionally impermissible message that certain religions are favored by the state.

Petitioners and *amici* attempt to confuse the symbolic nature of a county courthouse or a city-county building with other forms of public property. For the purposes of the First Amendment, however, this Court has long distinguished between various forms of public property. In *Perry Educ. Ass'n. v. Perry Local Educator's Ass'n*, 460 U.S. 3, 44 (1983), Justice White stated explicitly that the First Amendment distinguishes between different forms of government property:

> The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.

The First Amendment attributes of government property clearly vary with the location. *Greer v. Spock*, 424 U.S. 828 (1976). The court of appeals properly concluded that activities conducted on the

premises of buildings which house the political offices of government are implicitly endorsed by the state. In the words of the Seventh Circuit, "the very phrase 'City Hall' is commonly used as a metaphor for government." *American Jewish Congress v. City of Chicago*, 827 F.2d at 128.

B. The Court Of Appeals Decision Complies With The Purpose Underlying The Constitutional Prohibition Against Government Endorsement Of Religion.

The establishment clause prohibits the social alienation which results from governmental endorsement of particular religions. Justice O'Connor described this fundamental purpose of the establishment clause in her concurring opinion in *Lynch:*

> The establishment clause prohibits the government from making adherence to a religion relevant in any way to a person's standing in the political community. . . . Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community.

465 U.S. at 689. In *Wallace v. Jaffree*, Justice O'Connor reaffirmed this understanding of the establishment clause:

> The *Lynch* concurrence suggested that the religious liberty protected by the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." Under this view, *Lemon*'s inquiry as to the purpose and effect of a statute requires courts to examine whether the government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement. (Citations omitted.)

472 U.S. 38, 69 (1985).

The undisputed evidence in this case demonstrates that the religious displays at issue cannot pass constitutional muster under this analysis. Malik Tunador, a Moslem, testified that he viewed the

Nativity Scene in the Allegheny County Courthouse when he went there to pick up an application for the extenstion of his passport. (J.A. 109.) He explained that upon seeing the creche he felt that his government was supporting a particular religion in preference to his religious beliefs. (J.A. 112.) The unconstitutionality of displaying a creche inside the county courthouse could be no more aptly demonstrated than through Mr. Tunador's experience. In acquiring a passport, one of the political benefits of citizenship, Mr. Tunador was confronted with stark evidence that he is not a full member of his political community.

Justice O'Connor expanded upon the endorsement test in *Wallace:*

> The endorsement test does not preclude government from acknowledging religion or from taking religion into acount in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred. Such an endorsement infringes the religious liberty of the nonadherent, for "when the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." (Citations omitted).

472 U.S. at 70. Sectarian religious symbols in the hallways and entranceways of the buildings which symbolize the government unconstitutionally diminish the political stature of those who do not adhere to the religious faiths represented there. The establishment clause prohibits the government from maintaining religious displays which demean religious minorities.

C. The Establishment Clause Forbids Governmental Endorsement Of Religion Regardless Of The Level Of Coercion.

Petitioners and *amici* urge that the Nativity Scene and the Chanukah Menorah do not run afoul of the establishment clause because they do not coerce anyone to act, speak, or believe in any manner. As Justice Powell made clear in *Committee For Public Educ. & Religious Liberty v. Nyquist*, "[t]he absence of any element of coercion, however, is irrelevant to questions arising under the

establishment clause." 413 U.S. 756, 785 (1973). The second prong of the *Lemon* test focuses solely upon the effect of the challenged governmental activity. 403 U.S. at 612. The establishment clause does not merely forbid the government from requiring its citizens to recite certain prayers or to genuflect before chosen symbols; it prohibits activities which have the effect of communicating governmental endorsement of religion. In *Lynch*, Justice O'Connor explained:

> The central issue in this case is whether Pawtucket has endorsed Christianity by its display of the creche. To answer that question, we must examine both what Pawtucket intended to communicate in displaying the creche and what message the city's display actually conveyed. The purpose and effect prongs of the *Lemon* test represent these two aspects of the meaning of the city's action. . . . The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

465 U.S at 690.

Petitioners' novel restatement of the establishment clause would tolerate government practices which this Court has held unconstitutional. In *McCollum v. Board of Educ.*, 333 U.S. 203 (1948), and in *Abington v. Schempp*, 374 U.S. 203 (1963), this Court struck down voluntary religious activities in the public schools, notwithstanding provisions which allowed students not to participate. The issue of coercion is germane only in determinations under the free exercise clause of the First Amendment, which is not at issue in this case. *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707 (1981). Petitioners' argument reverses constitutional analysis under the religious liberty clauses. The argument that the religious symbols may withstand constitutional scrutiny simply because they do not compel action or belief is entirely without merit or relevance under the establishment clause.

II. The Court of Appeals' Location-Oriented Analysis is Mandated by the Establishment Clause.

A. The Court of Appeals Correctly Examined The Character Of The Specific Locations Of The Religious Symbols.

Although the County of Allegheny and *amici* criticize the court of appeals for drawing constitutional distinctions based upon the

specific locations of the Chanukah Menorah and the Nativity Scene, the establishment clause requires such an inquiry. As noted above, Chief Justice Burger and Justice O'Connor reaffirmed in *Lynch* the necessity of analyzing the effect created by the particular circumstances of each case. The First Amendment frequently requires that fine distinctions be drawn. In *Walz v. Tax Commission*, Chief Justice Burger, writing for the Court, explained, "it is an essential part of adjudication to draw distinctions, even fine ones, in the process of interpreting the constitution." 397 U.S. 664, 669 (1970).

Petitioners also suggest that an emphasis on location leads to an absolutist interpretation of the First Amendment. This Court's approach to establishment clause issues invariably includes a sensitivity to the physical context of the challenged activities, yet this has produced a careful, case-by-case review, not absolutism. *Lynch*, 465 U.S. at 678. In *McCollum v. Board of Educ.*, 333 U.S. 203 (1948), this Court struck down a program which permitted teachers affiliated with sectarian religious institutions to provide instruction inside the public schools. Emphasizing the unconstitutional proximity of government and religion, Justice Black explained:

> The state's tax supported public school buildings are used for the dissemination of religious doctrine . . . . This is not separation of Church and State.

333 U.S. at 212.

Four years later, however, this Court distinguished a released-time program which took advantage of the machinery of the state public school system to allow for voluntary religious instruction near, but not on, the premises of the public schools. *Zorach v. Clauson*, 343 U.S. 306 (1952). Justice Douglas recognized that "the school is a crutch on which the churches are leaning for support in their religious training" but distinguished *McCollum* because the instruction did not take place inside the public school facilities. 343 U.S. at 315. Establishment clause determinations obviously vary depending on the physical setting of the challenged activity.

School prayer decisions also illustrate this Court's attentiveness to the constitutional significance of the physical environment of

religious activities. In *Engel v. Vitale*, this Court held unconstitutional the practice of reciting prayers in public schools:

> We think that by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the establishment clause.

370 U.S. 422, 424 (1962). Yet prayer in the setting of a state university does not offend the establishment clause. *Widmar v. Vincent*, 454 U.S. 263 (1981). Examining the effects of state-sanctioned prayer in yet another physical environment, this Court also upheld a government funded chaplaincy in a state legislature. *Marsh v. Chambers*, 463 U.S. 783 (1983).

Location-sensitive reasoning clearly is one of the hallmarks of establishment clause jurisprudence. The provision which prohibits the display of the Ten Commandments in a public school system does not proscribe the presence of the same legal code in the chambers of this Court. *Stone v. Graham*, 449 U.S. 39 (1980). In holding that the religious symbols at the Allegheny County Courthouse and the Pittsburgh City-County Building unconstitutionally united government and religion, the court of appeals applied the proper analytical framework by considering their physical context.

B. The Court of Appeals Correctly Distinguished *Lynch v. Donnelly*.

Although this Court has previously considered the constitutionality of religious displays, those cases have not involved the message of government endorsement of religion communicated by the particular context of this case. *Lynch v. Donnelly*, 465 U.S. 668 (1984); *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided Court*, 471 U.S. 83 (1985).

The court of appeals properly recognized that while *Lynch* is a significant decision, it is closely tied to its facts. 842 F.2d at 660. In *Lynch*, this Court held that a municipality's limited financial support for a Nativity Scene erected by private citizens in a private park did not violate the establishment clause. Unlike the present case, however, there was no public manifestation of the government's sponsorship of the religious display.

More importantly, this Court emphasized repeatedly that the *Lynch* decision does *not* stand for broad propositions extending beyond the context of the case. Chief Justice Burger initiated the Court's analysis by underscoring the constitutional significance of the particular facts of each case under the establishment clause: "In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed." 465 U.S at 678. Citing *Lemon*, Chief Justice Burger stressed that analysis under the establishment clause is closely tied to the facts of the case. *Id.* In holding that the Pawtucket display did not arise from an impermissible religious purpose under the first prong of the *Lemon* test, Chief Justice Burger once again emphasized the specific factual context then before the Court:

> When viewed in the proper context of the Christmas Holiday season, it is apparent that, *on this record*, there is insufficient evidence to establish that the inclusion of the creche is a purposeful or surreptitious effort to express some kind of subtle government advocacy of a particular religious message. (Emphasis added.)

465 U.S. at 682.

In her concurrence, Justice O'Connor also stressed several times that *Lynch* arose from and is limited to the specific factual circumstances then before the Court. After concluding that the display of the Pawtucket creche "in this particular setting" did not constitute a violation of the establishment clause, Justice O'Connor continued:

> Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion. . . . I cannot say that the *particular creche display at issue in this case* was intended to endorse or had the effect of endorsing Christianity. (Emphasis added.)

465 U.S. 694. Unlike the passive symbols in *Lynch*, the particular religious symbols at issue here dominate the interior and exterior of buildings which house the vital organs of government.

In *McCreary*, this Court's only other consideration of the constitutionality of a religious display, four Justices affirmed without opinion a decision of the Second Circuit which held that the First Amendment's guarantee of free speech prohibits the government from discriminating against religious expression in the context of a

public forum. 471 U.S. 83 (1985) Significantly, the Second Circuit in *McCreary* explicitly noted that religious expression in a traditional public forum does not bear the imprimatur of government approval. 739 F.2d at 724. The setting of the present case, however, symbolizes the very essence of government.

Although petitioners, at this late hour, attempt to show that the Allegheny County Courthouse bears some of the characteristics of a public forum, the record is devoid of any support for this argument, and in fact demonstrates that precisely the opposite is true. While various cultural programs do occur inside the county courthouse, no activity may take place without receiving prior approval from the county. Ms. Minteer, the Manager of the Bureau of Cultural Programs for the County of Allegheny, described the written policy which governs displays inside the courthouse. A government official may withhold approval over all forms of expression in the courthouse. (J.A. 200-202.)

A forum in which government authorities exercise content-based restrictions upon expression does not constitute a public forum. *See, e.g., Widmar v. Vincent; Perry*. Being subject to such restrictions, the Allegheny County Courthouse plainly does not constitute a public forum. No evidence was presented regarding the use of the steps of the Pittsburgh City-County Building for the purposes of expression. Accordingly, there is no support for the proposition that the City-County Building is a public forum.

In sum, the court of appeals properly analyzed the physical context presented in this case. Heeding the limits of *Lynch*, the court of appeals examined the constitutional significance of the symbolic effect of the physical locations of the two religious displays under the *Lemon* test and properly held that those displays do not withstand constitutional scrutiny.

III. Examples of Religion in Public Life are Constitutionally Irrelevant to the First Amendment Issues Raised by the Nativity Scene and the Chanukah Menorah.

Citing the role of religion in our national heritage, *amici* ignore the specific facts of this case and zealously defend various references to religion in our nation's public life. This case, however, does not

involve a biblical verse on a national monument or a piece of art depicting a kneeling George Washington. This case concerns only the constitutionality of government sponsorship of two particular religious symbols at two particular locations. The court of appeals explicitly limited its decision to the facts presented in the case:

> Nor are we concerned with the use of religious objects in a museum or as educational instruments in a classroom, in which circumstances the objects could be presented neutrally. Thus, it could not reasonably be believed that the school authorities were endorsing a religion if they included a display of a creche or a menorah as a demonstration of religious objects in a history course. Similarly, a display of religious paintings in a public museum merely reflects an appreciation of the artistic value of the objects. Here, however, the effect is different as it is evident that the religious displays of the city and county have the effect of endorsing the messages reflected by the displays. This is unconstitutional.

842 F.2d at 663.

Although *amici* imply that respondents oppose the role of religion in our national heritage, to the contrary, the respondents in this case include clergy and lay figures committed to promoting our precious heritage of religious freedom. *Amici* draw extensively upon various examples of religious references in the remarks of historical American figures whose eighteenth century discourse was fraught with religious allusions. Such examples, many of which in any event predate the ratification of the First Amendment, cannot dictate contemporary constitutional analysis.

This nation's religious composition is vastly more diverse than it was two hundred years ago. *Abington v. Schempp*, 374 U.S. 203, 241 (Brennan, J., concurring). In *Abington*, Justice Brennan cautioned against relying too heavily in matters of religious liberty upon the advice of the founding fathers, because their message may not be relevant to a society more heterogenous than theirs. *Id.*

A modern establishment clause debate is poorly informed by brandishing conflicting views extracted from the speeches and correspondence of eighteenth century politicians. For each example of an early president's invocation of divine authority there can be found another's principled refusal to permit any sectarian influences upon

government. As this Court has noted, both Thomas Jefferson and Andrew Jackson refused on establishment clause grounds to declare national days of Thanksgiving or fasting during their respective terms as president. *Abington*, 463 U.S. at 807. Rather than dismissing minor encroachments on the establishment clause as harmless acknowledgements of our national Christian heritage, James Madison urged vigilance against the establishment of this familiar faith in our nation's political institutions:

> It is proper to take alarm at the first experiment on our liberties. . . . Who does not see that the same authority which can establish Christianity . . . may establish with the same ease any particular sect of Christianity, in exclusion of other sects?

"Memorial & Remonstrance Against Religious Assessments," 5 *The Founders' Constitution* 82 (1987).

In *Lynch*, Justice O'Connor emphasized that historical customs do not determine whether a particular activity violates the establishment clause:

> [W]hether a government activity communicates endorsement of religion is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts.

465 U.S. 693-694. The social facts of this case clearly demonstrate that Malik Tunador and others felt demeaned by their government's display of the two religious symbols present in this case. The analysis of this case is governed by the constitutional effect of this social reality, not by references to centuries-old expressions of humility before a divine authority. As Justice Brennan pointed out in his dissent in *Marsh v. Chambers:*

> We have recognized in a wide variety of constitutional contexts that the practices that were in place at the time any particular guarantee was enacted into the constitution do not necessarily fix forever the meaning of that guarantee.

463 U.S. at 816.

The First Amendment requires the Court to translate the "majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the Eighteenth Century, into concrete restraints on officials dealing with the problems of the twentieth century." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943). President John Adams issued a series of official proclamations which called upon Americans to engage in Christian prayer. *Marsh*, 463 U.S. at 818, (Brennan, J., dissenting). The mere passage of time does not render constitutional a practice which may have gone unchallenged long ago.

IV. The Presence of a Christmas Tree Does Not Require the City of Pittsburgh to Display a Chanukah Menorah.

Petitioner Chabad contends that the First Amendment requires the City of Pittsburgh to display a Chanukah Menorah on the steps of the City-County Building because a Christmas tree is on display there. This proposition is without legal or factual foundation. Indeed, the argument concedes that such displays violate the establishment clause through the government's support for particular faiths or denominations.

Chabad contends first that a seasonal Christmas tree is a religious symbol. The trial court received no evidence concerning the religious symbolism of the Christmas tree. In *Lynch*, Chief Justice Burger classified the Christmas tree as one of the secular decorations of the holiday season, indicating that it lacked religious significance. 465 U.S. at 671.

Working on the assumption that the Christmas tree constitutes a religious symbol, Chabad argues that the government must also display a Chanukah Menorah to avoid preferring one religion over another. That position reveals the patent constitutional violation presented by the display of religious symbols on the premises of buildings which symbolize the government. Under this analysis, the unconstitutional governmental preference for one religion would be cured by coupling with it another such unconstitutional display. This Court explained in *Grand Rapids* that multidenominational endorse-

ments are no more constitutional than government support for a single faith:

> Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations.

473 U.S. at 389. Chabad's interpretation of the First Amendment would result in a system that accommodates those faiths whose political power or popular iconography leads to representation in public buildings, but would exclude faiths which lack political influence or representative physical symbols. The establishment clause prohibits such governmental endorsement of one or more religions. *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947).

Finally, Chabad's position conflicts with its continued insistence that the Chanukah Menorah is not a religious symbol. The court of appeals recognized that a Chanukah Menorah generally is perceived to be a religious symbol, and properly refused to engage in a study of the fine points of Jewish law which Chabad advanced in support of the proposition that the Menorah is without religious significance:

> Further, we cannot believe that the general public would be aware of the religious fine point made by Chabad and thus view that display of a menorah as a lesser endorsement of religion than that of a Torah scroll or other object regarded as sacred. In any event regardless of the lack of religious significance of a menorah its sectarian character is clear and thus even though it may not be regarded as a sacred object its placement was an endorsement of religion.

842 F.2d at 662.

The simple reality that Chabad wishes to display the Chanukah Menorah during the Jewish holiday of Chanukah and to conduct public candlelighting ceremonies which include religious blessings demonstrates beyond any doubt the significance of the Menorah as a religious symbol. Moreover, unlike various symbols associated with the Christmas season, it cannot be argued that the Chanukah Menorah possesses a separate cultural or secular significance. The constitutional test looks solely at the effect of the objective perception of the Menorah. *Lynch*, 465 U.S. at 689 (O'Connor, J., concur-

ring). To the objective observer, the Menorah communicates a religious message. (J.A. 140.)

Our nation's spirit of religious liberty flourishes when groups and individuals engage in the unfettered practice of their religious beliefs. The freedom to worship according to the dictates of one's conscience is diminished, however, when the state grants a preferred position to any one faith. As Justices Goldberg and Harlan observed in *Abington:*

> The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief.

374 U.S. at 305 (Goldberg, J., concurring). Religious symbols on property which represents the state detract from the fullest realization of religious liberty. True religious equality cannot tolerate a Nativity Scene and a Chanukah Menorah dominating structures of government power.

CONCLUSION

For the reasons stated herein, Respondent Malik Tunador respectfully urges that the decision of the court of appeals be affirmed.

Respectfully submitted,

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